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Wrongful Birth: The Avoidance of Consequences Doctrine in Mitigation of Damages

Norman M. Block

WRONGFUL BIRTH: THE AVOIDANCE OF CONSEQUENCES DOCTRINE IN MITIGATION OF DAMAGES

INTRODUCTION

With the increasing use of voluntary sterilization as a means of birth control,[1] the recently recognized wrongful birth suit[2] will become more prevalent.[3] These suits arise when a normal, healthy child is born,[4] usually after one of the parents has undergone either a tubal ligation or vasectomy.[5] The typical and most successful cause of action in wrongful

1. *See* N.Y. Times, Dec. 9, 1984, at 29, col. 1. The National Center for Health Statistics reported that in 1982 18% of couples with one partner of child bearing age used sterilization to avoid conception, 16% used birth control pills, 7% used condoms, 5% used diaphragms, and 4% used intrauterine devices. *Id.* This is a change from 1965, when the pill, condom, rhythm, and diaphragm were the leading methods. *Id.* at col. 2. Among couples who wanted no more children, as opposed to just wanting to delay child rearing, the use of sterilization tripled between 1965 and 1982, from 18% to 62%. *Id.* at col. 4.

2. *See* W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts § 55, at 370 (5th ed. 1984) [hereinafter cited as Prosser and Keeton]; Note, *Wrongful Birth: A Child of Tort Comes of Age*, 50 U. Cin. L. Rev. 65, 65-66 (1981) [hereinafter cited as *Wrongful Birth*]. There has been some difference of opinion among courts and commentators as to the proper name for this type of suit. Some have preferred "wrongful conception" or "wrongful pregnancy," based on a belief that the actual wrongdoing attributable to the defendant is the conception or pregnancy itself, and not the resulting birth. *See* White v. United States, 510 F. Supp. 146, 149 (D. Kan. 1981) (quoting Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975)); Miller v. Duhart, 637 S.W.2d 183, 188 (Mo. Ct. App. 1982); O'Toole v. Greenberg, No. 59, slip op. at 3 (N.Y. Mar. 26, 1985); Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. Miami L. Rev. 1409, 1409-10 (1977); Note, *Wrongful Conception: Who Pays for Bringing Up Baby?*, 47 Fordham L. Rev. 418, 418 n.7 (1978) [hereinafter cited as *Wrongful Conception*]. Because the suits discussed in this Note include cases in which the pregnancy was not diagnosed or incorrectly aborted, "wrongful conception" and "wrongful pregnancy" are too limiting for purposes of this Note. Thus, the phrase "wrongful birth" will be used throughout.

3. *See* Prosser and Keeton, *supra* note 2, § 55, at 371-72; *Wrongful Birth*, *supra* note 2, at 65; Annot., 83 A.L.R.3d 15, 20 (1978). See *infra* notes 8-10 and accompanying text.

4. *See* University of Ariz. Health Sciences Center v. Superior Court, 136 Ariz. 579, 581 n.1, 667 P.2d 1294, 1296 n.1 (1983) (en banc); Bushman v. Burns Clinic Medical Center, 83 Mich. App. 453, 459-60, 268 N.W.2d 683, 685-86 (1978); Weintraub v. Brown, 98 A.D.2d 339, 342, 470 N.Y.S.2d 634, 637 (1983). A wrongful birth suit differs from the "wrongful life" suit, which is brought as a result of some injury to the child caused by the physician's negligence in diagnosing the pregnancy or failing to inform the parents that the child might be deformed so that the fetus could be safely aborted. Prosser and Keeton, *supra* note 2, at 370; *see* Kashi, *supra* note 2, at 1426-29; *see, e.g.*, Robak v. United States, 658 F.2d 471, 473 (7th Cir. 1981) (failure to inform); Berman v. Allan, 80 N.J. 421, 424, 404 A.2d 8, 10 (1979) (same), *overruled*, Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984); Gleitman v. Cosgrove, 49 N.J. 22, 24, 227 A.2d 689, 690 (1967) (same); Comras v. Lewin, 183 N.J. Super. 42, 44, 443 A.2d 229, 229-30 (1982) (failure to diagnose pregnancy); Park v. Chessin, 60 A.D.2d 80, 83, 400 N.Y.S.2d 110, 111 (1977) (failure to inform).

5. *See, e.g.*, Hartke v. McKelway, 707 F.2d 1544, 1547 (D.C. Cir.) (tubal ligation), *cert. denied*, 104 S. Ct. 425 (1983); McNeal v. United States, 689 F.2d 1200, 1200-01 (4th Cir. 1982) (same); Boone v. Mullendore, 416 So. 2d 718, 719 (Ala. 1982) (same); Flowers v. District of Columbia, 478 A.2d 1073, 1074 (D.C. 1984) (same); Cockrum v. Baumgart-

birth suits has been based on the negligence of the physician in incorrectly performing the procedure.[6]

This Note addresses the damages awarded in these wrongful birth suits, focusing on one method of mitigating damages: the avoidance of consequences doctrine.[7] The Note first discusses the scope of damages

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ner, 95 Ill. 2d 193, 195, 447 N.E.2d 385, 386 (vasectomy), *cert. denied*, 104 S. Ct. 149 (1983); Schork v. Huber, 648 S.W.2d 861, 862 (Ky. 1983) (tubal ligation); Bushman v. Burns Clinic Medical Center, 83 Mich. App. 453, 457, 268 N.W.2d 683, 685 (1978) (vasectomy); Kingsbury v. Smith, 127 N.H. 237, 240, 442 A.2d 1003, 1004 (1982) (tubal ligation); P. v. Portadin, 179 N.J. Super. 465, 468, 432 A.2d 556, 557 (1981) (same); Rivera v. State, 94 Misc. 2d 157, 158, 404 N.Y.S.2d 950, 951 (Ct. Cl. 1978) (same); Stribling v. deQuevedo, 288 Pa. Super. 436, 438, 432 A.2d 239, 240 (1980) (same); Hickman v. Myers, 632 S.W.2d 869, 869 (Tex. Civ. App. 1982) (same); McKernan v. Aasheim, 102 Wash. 2d 411, — , 687 P.2d 850, 851 (1984) (same); Ball v. Mudge, 64 Wash. 2d 247, 247, 391 P. 2d 201, 202 (1964) (vasectomy).

Other situations that have resulted in suits for wrongful birth have included negligence in performing an abortion, resulting in the birth of the child, *see* Stills v. Gratton, 55 Cal. App. 3d 698, 701, 127 Cal. Rptr. 652, 653-54 (1976); Wilczynski v. Goodman, 73 Ill. App. 3d 51, 52, 391 N.E.2d 479, 480 (1979); Nanke v. Napier, 346 N.W.2d 520, 521 (Iowa 1984); Jean-Charles v. Planned Parenthood Ass'n of the Mohawk Valley, Inc., 99 A.D.2d 542, 542, 471 N.Y.S.2d 622, 623 (1984); Delaney v. Krafte, 98 A.D.2d 128, 129, 470 N.Y.S.2d 936, 937 (1984), failure to diagnose the pregnancy so that an abortion could be performed at an early enough stage of the pregnancy to assure the mother's safety, *see* Cockrum v. Baumgartner, 95 Ill. 2d 193, 195-96, 447 N.E.2d 385, 387, *cert. denied*, 104 S. Ct. 149 (1983); Clapham v. Yanga, 102 Mich. App. 47, 50-51, 300 N.W.2d 727, 730 (1980), *appeal dismissed*, 412 Mich. 889, 335 N.W.2d 1 (1981); Ziemba v. Sternberg, 45 A.D.2d 230, 230-31, 357 N.Y.S.2d 265, 267 (1974), Rieck v. Medical Protective Co., 64 Wis. 2d 514, 515-16, 219 N.W.2d 242, 244 (1974), substitution by the pharmacist of the wrong medication instead of birth control pills, *see* Troppi v. Scarf, 31 Mich. App. 240, 244, 187 N.W.2d 511, 512-13 (1971), and the failure of a condom to prevent a pregnancy, *see* M. & Wife v. Schmid Laboratories, 178 N.J. Super. 122, 124, 428 A.2d 515, 516 (1981) (per curiam).

6. *See, e.g.*, Flowers v. District of Columbia, 478 A.2d 1073, 1074 (D.C. 1984); Nanke v. Napier, 346 N.W.2d 520, 521 (Iowa 1984); Hickman v. Myers, 632 S.W.2d 869, 869 (Tex. Civ. App. 1982); McKernan v. Aasheim, 102 Wash. 2d 411, — , 687 P.2d 850, 851 (1984). Often, negligence is pleaded in the alternative with breach of contract or warranty, or with misrepresentation that the plaintiff was indeed sterile as the primary claim, *see, e.g.*, Bishop v. Byrne, 265 F. Supp. 460, 463 (S.D. W. Va. 1967) (breach of warranty); Boone v. Mullendore, 416 So. 2d 718, 719 (Ala. 1982) (misrepresentation); Coleman v. Garrison, 349 A.2d 8, 12 (Del. 1975) (misrepresentation and breach of warranty); Fulton-DeKalb Hosp. Auth. v. Graves, 252 Ga. 441, 442, 314 S.E.2d 653, 654 (1984) (misrepresentation); Cox v. Stretton, 77 Misc. 2d 155, 156, 352 N.Y.S.2d 834, 837 (Sup. Ct. 1974) (breach of contract); Hays v. Hall, 477 S.W.2d 402, 403 (Tex. Civ. App.) (misrepresentation and breach of warranty), *rev'd on other grounds*, 488 S.W.2d 412 (Tex. 1972). Often only breach of contract is alleged. *See, e.g.*, Herrera v. Roessing, 533 P.2d 60, 61 (Colo. Ct. App. 1975); Rogala v. Silva, 16 Ill. App. 3d 63, 64, 305 N.E.2d 571, 572 (1973); Christensen v. Thornby, 192 Minn. 123, 125, 255 N.W. 620, 621 (1934); Green v. Sudakin, 81 Mich. App. 545, 546, 265 N.W.2d 411, 411 (1978) (per curiam); Shaheen v. Knight, 11 Pa. D. & C.2d 41, 41 (1957).

7. See *infra* notes 35-44 and accompanying text. The avoidable consequences doctrine has normally been equated with the concept of mitigation of damages. *See* Baglio v. N.Y. Central R.R., 344 Mass. 14, 18, 180 N.E.2d 798, 800 (1962) (quoting Ouilette v. Sheerin, 297 Mass. 536, 543, 9 N.E.2d 713, 717 (1937)). Many courts and commentators have incorrectly considered the benefits offset doctrine in the Restatement (Second) of Torts § 920 (1979) to be another form of mitigation. *See, e.g.*, Mason v. Western Pa. Hosp., 286 Pa. Super. 354, 372, 428 A.2d 1366, 1375 (1981) (Brosky, J., concurring),

awarded in these suits and the attempts by some courts to limit these damages. It then explores the avoidance of consequences doctrine as a means of limiting the damages and examines how courts have viewed the reasonableness of the mitigating action as a matter of law. This Note proposes a method for application of the avoidance of consequences doctrine in wrongful birth suits: The jury should determine the amount of damages awarded by considering what would have been done by the reasonably prudent person in the circumstances of the plaintiff. These circumstances would include those religious, ethical and moral beliefs that the plaintiff establishes. This Note then examines other criticisms of the avoidance of consequences doctrine and why the proposed application renders them invalid.

I. SCOPE OF DAMAGES IN WRONGFUL BIRTH ACTIONS

In the earliest cases, courts did not recognize wrongful birth as a cause of action and refused to award any damages to the plaintiffs.[8] They stated a policy rationale that the birth of a normal, healthy child was not a compensable wrong.[9] Once this tort became accepted,[10] however, courts began to award a broad range of damages including all medical expenses incident to the pregnancy,[11] the mother's loss of earnings during the pregnancy,[12] pain and suffering as a result of the pregnancy and

rev'd, 499 Pa. 484, 453 A.2d 974 (1982); *Wrongful Conception*, *supra* note 2 at 431-32. This confusion may result from the Restatement's own formulation of the benefit offset rule: "[T]he value of the benefit conferred is considered in *mitigation* of damages, to the extent that this is equitable." Restatement (Second) of Torts § 920 (1979) (emphasis added). Mitigation is not simply a damages offset, but instead speaks to the duty to limit damages as reflected in *id.* § 918.

8. *See* Christensen v. Thornby, 192 Minn. 123, 126, 255 N.W. 620, 622 (1934); Shaheen v. Knight, 11 Pa. D. & C.2d 41, 45-46 (1957).

9. *See* Christensen v. Thornby, 192 Minn. 123, 126, 255 N.W. 620, 622 (1934) (plaintiff was "blessed with the fatherhood of another child"); Shaheen v. Knight, 11 Pa. D. & C.2d 41, 45 (1957) ("to allow damages for the normal birth of a normal child is foreign to the universal public sentiment of the people").

10. The first case to award damages for wrongful birth was Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967), which recognized that the purpose of the suit was not to pay for the unwanted child but to "replenish the family exchequer so that the new arrival will not deprive the other members of the family of what was planned as their just share of the family income." *Id.* at 324, 59 Cal. Rptr. at 477. Since that case, the majority of jurisdictions has come to recognize wrongful birth as a compensable damage. *See* Prosser and Keeton, *supra* note 2, § 55, at 372.

11. *See, e.g.*, White v. United States, 510 F. Supp. 146, 150 (D. Kan. 1981); Public Health Trust v. Brown, 388 So. 2d 1084, 1085-86 (Fla. Dist. Ct. App. 1980); Maggard v. McKelvey, 627 S.W.2d 44, 48 (Ky. Ct. App. 1981); Kingsbury v. Smith, 122 N.H. 237, 243, 442 A.2d 1003, 1006 (1982); Weintraub v. Brown, 98 A.D.2d 339, 349, 470 N.Y.S.2d 634, 641 (1983); Sala v. Tomlinson, 73 A.D.2d 724, 726, 422 N.Y.S.2d 506, 509 (1979); Bowman v. Davis, 48 Ohio St. 2d 41, 42, 46, 356 N.E.2d 496, 497, 499 (1976).

12. *See, e.g.*, Fassoulas v. Ramey, 450 So. 2d 822, 823 (Fla. 1984) (per curiam); Public Health Trust v. Brown, 388 So. 2d 1084, 1085-86 (Fla. Dist. Ct. App. 1980); P. v. Portadin, 179 N.J. Super. 465, 472, 432 A.2d 556, 559 (1981); Beardsley v. Wierdsma, 650 P.2d 288, 292 (Wyo. 1982).

birth,[13] loss of consortium,[14] mental anguish and emotional distress for the parents,[15] and the costs of raising the child until majority.[16]

The damages awarded for child rearing costs have been the most controversial.[17] Most courts refuse to award them.[18] Their rationales have included: child rearing costs are too speculative and uncertain to calculate;[19] these costs are too remote and not within the foreseeable risk undertaken by the defendant;[20] the damages would be excessive;[21] the defendant should not have to bear the costs of rearing the child while

13. *See, e.g.*, White v. United States, 510 F. Supp. 146, 150 (D. Kan. 1981); Boone v. Mullendore, 416 So. 2d 718, 723 (Ala. 1982); Public Health Trust v. Brown, 388 So. 2d 1084, 1085 (Fla. Dist. Ct. App. 1980); Bushman v. Burns Clinic Medical Center, 83 Mich. App. 453, 461, 268 N.W.2d 683, 687 (1978).

14. *See, e.g.*, Boone v. Mullendore, 416 So. 2d 718, 723 (Ala. 1982); Fassoulas v. Ramey, 450 So. 2d 822, 823 (Fla. 1984) (per curiam); Fulton-DeKalb Hosp. Auth. v. Graves, 252 Ga. 441, 443, 314 S.E.2d 653, 654 (1984); P. v. Portadin, 179 N.J. Super. 465, 472, 432 A.2d 556, 559 (1981); Sorkin v. Lee, 78 A.D.2d 180, 184, 434 N.Y.S.2d 300, 303 (1980); Ziemba v. Sternberg, 45 A.D.2d 230, 231, 233, 357 N.Y.S.2d 265, 267, 269 (1974).

15. *See, e.g.*, Bishop v. Byrne, 265 F. Supp. 460, 463-65 (S.D. W. Va. 1967); Green v. Sudakin, 81 Mich. App. 545, 548-49, 265 N.W.2d 411, 412-13 (1978) (per curiam); Troppi v. Scarf, 31 Mich. App. 240, 244, 262, 187 N.W.2d 511, 513, 521 (1971); Beardsley v. Wierdsma, 650 P.2d 288, 292 (Wyo. 1982). Some courts have refused to award this type of damages. *See, e.g.*, Sala v. Tomlinson, 73 A.D.2d 724, 726, 422 N.Y.S.2d 506, 509 (1979); Stribling v. deQuevedo, 288 Pa. Super. 436, 442-43, 432 A.2d 239, 242-43 (1980).

16. *See, e.g.*, University of Ariz. Health Sciences Center v. Superior Court, 136 Ariz. 579, 584-86, 667 P.2d 1294, 1299-1301 (1983) (en banc); Custodio v. Bauer, 251 Cal. App. 2d 303, 324-25, 59 Cal. Rptr. 463, 477 (1967); Ochs v. Borrelli, 187 Conn. 253, 258, 445 A.2d 883, 885 (1982); Anonymous v. Hospital, 33 Conn. Supp. 125, 128-29, 366 A.2d 204, 206 (1976); Jones v. Malinowski, 299 Md. 257, 270, 473 A.2d 429, 435 (1984); Clapham v. Yanga, 102 Mich. App. 47, 58, 61, 300 N.W.2d 727, 732, 735 (1980), *appeal dismissed*, 412 Mich. 889, 335 N.W.2d 1 (1982); Green v. Sudakin, 81 Mich. App. 545, 547-48, 265 N.W.2d 411, 412 (1978) (per curiam); Betancourt v. Gaylor, 136 N.J. Super. 69, 76-77, 344 A.2d 336, 340 (1975); Cox v. Stretton, 77 Misc. 2d 155, 160-61, 352 N.Y.S.2d 834, 841-42 (Sup. Ct. 1974); Bowman v. Davis, 48 Ohio St. 2d 41, 42-46, 356 N.E.2d 496, 497-99 (1976) (per curiam); Stribling v. deQuevedo, 288 Pa. Super. 436, 441, 432 A.2d 239, 242 (1980).

17. Prosser and Keeton, *supra* note 2, § 55, at 372; *see* Cockrum v. Baumgartner, 95 Ill. 2d 193, 196-97, 447 N.E.2d 385, 387, *cert. denied*, 104 S. Ct. 149 (1983); Comment, *Damages for the Wrongful Birth of Healthy Babies*, 21 Duq. L. Rev. 605, 607 (1983) [hereinafter cited as *Damages for Wrongful Birth*].

18. Cockrum v. Baumgarter, 95 Ill. 2d 193, 197, 447 N.E.2d 385, 387, *cert. denied*, 104 S. Ct. 149 (1983); Prosser and Keeton, *supra* note 2, § 55, at 372.

19. *See, e.g.*, Boone v. Mullendore, 416 So. 2d 718, 721 (Ala. 1982); Coleman v. Garrison, 327 A.2d 757, 761 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975); Schork v. Huber, 648 S.W.2d 861, 862 (Ky. 1983); Sorkin v. Lee, 78 A.D.2d 180, 181, 434 N.Y.S.2d 300, 301 (1980); Sala v. Tomlinson, 73 A.D.2d 724, 726, 422 N.Y.S.2d 506, 509 (1979); Beardsley v. Wierdsma, 650 P.2d 288, 292 (Wyo. 1982).

20. *See, e.g.*, Schork v. Huber, 648 S.W.2d 861, 862 (Ky. 1983); Hickman v. Myers, 632 S.W.2d 869, 871-72 (Tex. Civ. App. 1982); Beardley v. Wierdsma, 650 P.2d 288, 292 (Wyo. 1982).

21. *See, e.g.*, White v. United States, 510 F. Supp. 146, 149 (D. Kan. 1981); Boone v. Mullendore, 416 So. 2d 718, 721-22 (Ala. 1982) (quoting Rieck v. Medical Protective Co., 64 Wis. 2d 514, 518, 219 N.W.2d 242, 244-45 (1974)); Sorkin v. Lee, 78 A.D.2d 180, 183, 434 N.Y.S.2d 300, 302 (1980); Beardsley v. Wierdsma, 650 P.2d 288, 292 (Wyo. 1982).

someone else enjoys the benefits associated with child rearing;[22] and the child will feel like an "emotional bastard" when he learns that his financial support is not being provided by his parents.[23]

Some courts award child rearing costs[24] but offset them by the anticipated benefits, both monetary and emotional, that the child will provide to the parents.[25] This form of mitigation is used to prevent unjust enrichment to the parent who retains the benefit of having the child while collecting damages from the defendant.[26] Some courts have, in calculating the offset, examined the circumstances of the parents, basing the award on a case-by-case standard that accounts for such factors as the number of children already in the family, the financial resources available to the parents and the reasons the parents sought to limit the size of the family.[27]

This use of the benefits offset has been criticized on several grounds. First, the victim of a tort should be entitled to recover all damages that result from the wrongdoing.[28] Second, the courts have failed to observe the "same interests" limitation specified in section 920 of the Restatement (Second) of Torts,[29] which provides that the benefits used to offset

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22. *See, e.g.*, McNeal v. United States, 689 F.2d 1200, 1202 (4th Cir. 1982); White v. United States, 510 F. Supp. 146, 149-50 (D. Kan. 1981); Coleman v. Garrison, 349 A.2d 8, 12 (Del. 1975); Flowers v. District of Columbia, 478 A.2d 1073, 1075 (D.C. 1984); Shaheen v. Knight, 11 Pa. D. & C.2d 41, 45-46 (1957); Hays v. Hall, 477 S.W.2d 402, 406 (Tex. Civ. App.), *rev'd on other grounds*, 488 S.W.2d 412 (Tex. 1972); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 518, 219 N.W.2d 242, 244-45 (1974).

23. *See, e.g.*, Boone v. Mullendore, 416 So. 2d 718, 722-23 (Ala. 1982); McKernan v. Aasheim, 102 Wash. 2d 411, __, 687 P.2d 850, 856 (1984) (en banc) (quoting Wilbur v. Kerr, 275 Ark. 239, 243-44, 628 S.W.2d 568, 571 (1982)).

24. *See, e.g.*, University of Ariz. Health Sciences Center v. Superior Court, 136 Ariz. 579, 584-86, 667 P.2d 1294, 1299-1301 (1983) (en banc); Ochs v. Borrelli, 187 Conn. 253, 259, 445 A.2d 883, 886 (1982); Anonymous v. Hospital, 33 Conn. Supp. 125, 128-29, 366 A.2d 204, 206 (1976); Jones v. Malinowski, 299 Md. 257, 270, 473 A.2d 429, 435 (1984); Green v. Sudakin, 81 Mich. App. 545, 547-48, 265 N.W.2d 411, 412 (1978) (per curiam).

25. The benefits offset rule is prescribed under Restatement (Second) of Torts § 920 (1979):

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

Id.

26. *See* Mason v. Western Pa. Hosp., 286 Pa. Super. 354, 363, 428 A.2d 1366, 1370 (1981), *vacated on other grounds*, 499 Pa. 484, 453 A.2d 974 (1982); Note, *Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant*, 68 Va. L. Rev. 1311, 1323 (1982) [hereinafter cited as *Judicial Limitations*].

27. *See* Hartke v. McKelway, 707 F.2d 1544, 1553-55 (D.C. Cir.), *cert. denied*, 104 S. Ct. 425 (1983); Jones v. Malinowski, 299 Md. 257, 272, 473 A.2d 429, 436-37 (1984); Troppi v. Scarf, 31 Mich. App. 240, 256, 187 N.W.2d 511, 518 (1971); Sorkin v. Lee, 78 A.D.2d 180, 188, 434 N.Y.S.2d 300, 305 (1980) (Hancock, Jr., J., dissenting).

28. *See* Custodio v. Bauer, 251 Cal. App. 2d 303, 325, 59 Cal. Rptr. 463, 477 (1967); Cockrum v. Baumgartner, 99 Ill. App. 3d 271, 272-73, 425 N.E.2d 968, 969-70 (1981), *rev'd*, 95 Ill. 2d 193, 447 N.E.2d 385, *cert. denied*, 104 S. Ct. 149 (1983); *Damages for Wrongful Birth*, *supra* note 17, at 621.

29. *See* University of Ariz. Health Sciences Center v. Superior Court, 136 Ariz. 579,

should be of the same type as the damages being awarded.[30] Using this principle, costs of child rearing would be offset by the expected financial benefits of having the child, and emotional distress damages would be offset by the emotional joys of child rearing.[31]

Many courts have utilized the benefits offset to hold that no cause of action exists for recovery of child rearing costs.[32] Some state that the intangible and incalculable benefits of a normal, healthy child are always greater than the costs of rearing the child.[33] Others believe that if child rearing costs were awarded and the benefits offset applied, parents, in order to maximize their recovery, would be put in the unsavory position of having to declare that they do not love or want the child, or that the child is of little value to them.[34]

II. USE OF THE AVOIDANCE OF CONSEQUENCES DOCTRINE

A. *General Application of the Doctrine*

The avoidance of consequences doctrine, as set forth in section 918 of the Restatement (Second) of Torts,[35] specifies that a plaintiff cannot recover for damages that could have been avoided by the use of reasonable effort after commission of the tort.[36] This section applies the same stan-

588-89, 667 P.2d 1294, 1303-04 (1983) (en banc) (Gordon, Vice C. J., dissenting); Flowers v. District of Columbia, 478 A.2d 1073, 1080 (D.C. 1984) (Ferren, J., dissenting); Fulton-DeKalb Hosp. Auth. v. Graves, 252 Ga. 441, 444, 314 S.E.2d 653, 655 (1984); *Damages for Wrongful Birth*, *supra* note 17, at 621; *Judicial Limitations*, *supra* note 26, at 1323-26; Note, *Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat*, 13 Val. U.L. Rev. 127, 162 (1978).

30. *See* Restatement (Second) of Torts § 920 comment b (1979).

31. *See Damages for Wrongful Birth*, *supra* note 17, at 621-22.

32. *See, e.g.*, Coleman v. Garrison, 327 A.2d 757, 760-61 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975); Public Health Trust v. Brown, 388 So. 2d 1084, 1085-86 (Fla. Dist. Ct. App. 1980); Nanke v. Napier, 346 N.W.2d 520, 523 (Iowa 1984); Shaheen v. Knight, 11 Pa. D. & C.2d 41, 45-46 (1957); Beardsley v. Wierdsma, 650 P.2d 288, 292 (Wyo. 1982).

33. *See* Coleman v. Garrison, 327 A.2d 757, 760-61 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975); Flowers v. District of Columbia, 478 A.2d 1073, 1075 (D.C. 1984); Public Health Trust v. Brown, 388 So. 2d 1084, 1085-86 (Fla. Dist. Ct. App. 1980); Fulton-DeKalb Hosp. Auth. v. Graves, 252 Ga. 441, 444, 314 S.E.2d 653, 655-56 (1984); O'Toole v. Greenberg, No. 59, slip op. at 6 (N.Y. Mar. 26, 1985); Mason v. Western Pa. Hosp., 499 Pa. 484, 487, 453 A.2d 974, 976 (1982); Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974); Ball v. Mudge, 64 Wash. 2d 247, 250, 391 P.2d 201, 204 (1964); Beardsley v. Wierdsma, 650 P.2d 288, 293 (Wyo. 1982).

34. *See* Boone v. Mullendore, 416 So. 2d 718, 723 (Ala. 1982); Flowers v. District of Columbia, 478 A.2d 1073, 1076 (D.C. 1984); Nanke v. Napier, 346 N.W.2d 520, 523 (Iowa 1984) (quoting Cockrum v. Baumgartner, 95 Ill. 2d 193, 202, 447 N.E.2d 385, 390, *cert. denied*, 104 S. Ct. 149 (1983)); Weintraub v. Brown, 98 A.D.2d 339, 348-49, 470 N.Y.S.2d 634, 641 (1983).

35. Restatement (Second) of Torts § 918 (1979).

36. *Id.* A similar doctrine can be found in Restatement (Second) of Contracts §350 (1981). However, plaintiffs using a contract theory alone as the basis of a cause of action in wrongful birth have generally been unsuccessful. See *supra* note 6. *But see* Green v. Sudakin, 81 Mich. App. 545, 547-49, 265 N.W.2d 411, 412-13 (1978) (damages awarded

dard of conduct to the plaintiff as is used in determining whether a person is negligent: what a reasonably prudent person under the circumstances would do to avoid damages.[37] It should be noted and emphasized that the plaintiff is not *required* to take any action to mitigate damages.[38] The plaintiff cannot recover, however, for any increase in the damages that results from failure to make that reasonable effort.[39] He can recover the costs of any mitigation efforts in addition to damages for the original injury up to the point when further injury could have been avoided by mitigation.[40] The burden of proof is placed on the defendant, who must show by a preponderance of evidence that a reasonably prudent person in the plaintiff's circumstances would have made the effort to avoid the consequences.[41] The burden on the plaintiff is to provide rebuttal evidence indicating that such an effort would not be reasonable.[42]

A common application of the doctrine is in personal injury cases.[43] The plaintiff must submit to reasonable medical treatment in order to avoid increased or permanent injury. Factors that are considered in de-

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for breach of contract). The discussion in this Note is limited to the application of the doctrine in tort law.

37. Restatement (Second) of Torts § 918 comment c (1979). This comment refers the reader back to §§286-309 of the Restatement for further clarification of the plaintiff's duty as a reasonably prudent person. *See also* Prosser and Keeton, *supra* note 2, §32, at 173-93 (defining the duty of the reasonably prudent person).

38. *See* Restatement (Second) of Torts § 918 comment a (1979).

> In the cases covered in this Section, it is not true that the injured person has a duty to act, . . . but recovery for the harm is denied because it is in part the result of the injured person's lack of care, and public policy requires that persons should be discouraged from wasting their resources, both physical or [sic] economic.

Id. "The doctrine is sometimes spoken of as involving a 'duty' or 'obligation' to seek a cure. This is technically inaccurate since the failure to obtain medical care does not create an obligation to anyone else—it merely limits the damages recoverable." Annot., 62 A.L.R.3d 9, 13 n.5 (1975); *see* White v. Chicago & N.W. Ry., 145 Iowa 408, 413-14, 124 N.W. 309, 311 (1910).

39. Restatement (Second) of Torts § 918 comment b (1979).

> If harm results because of his careless failure to make substantial efforts or incur expense [to avert the consequences of the tort], the damages for the harm suffered are reduced to the value of the efforts he should have made or the amount of expense he should have incurred, in addition to the harm previously caused.

Id.; *see* Shewry v. Heuer, 255 Iowa 147, 154-55, 121 N.W.2d 529, 533-34 (1963).

40. Restatement (Second) of Torts § 918 comment b (1979).

41. *See* Shewry v. Heuer, 255 Iowa 147, 154, 121 N.W.2d 529, 533 (1963); Zimmerman v. Ausland, 266 Or. 427, 432, 513 P.2d 1167, 1169 (1973) (en banc), D. Dobbs, Handbook on the Law of Remedies § 3.7, at 189 (1973); C. McCormick, Handbook on the Law of Damages §36, at 136-37 (1935). See *infra* note 84 and accompanying text.

42. *See* G. Lilly, An Introduction to the Law of Evidence § 15, at 45 (1978); C. McCormick, Handbook on the Law of Evidence § 339, at 958 n.14 (E. Cleary 3d ed. 1984) [hereinafter cited as McCormick on Evidence].

43. *See, e.g.*, Stark v. Shell Oil Co., 450 F.2d 994, 997 (5th Cir. 1971); Quadrino v. S.S. Theron, 436 F.2d 959, 959-60 (2d Cir. 1970) (per curiam); Hayes v. United States, 367 F.2d 340, 341 (2d Cir. 1966); Rosenstein v. Chicago Transit Auth., 12 Ill. App. 3d 1089, 1093, 299 N.E.2d 396, 399 (1973); Smith v. Jones, 382 Mich. 176, 186-87, 169 N.W.2d 308, 310-11 (1969).

termining whether the treatment is reasonable include the cost of the treatment, the risks involved, the inconvenience the plaintiff would suffer by undergoing the treatment and the likelihood of success.[44]

Application of the avoidance of consequences doctrine in wrongful birth cases would limit the damages awarded to the point at which the reasonable plaintiff could have acted to avoid greater injury and loss—either when the fetus could be safely aborted or when the child could be placed for adoption—if these are actions the reasonably prudent person in the circumstances of the plaintiff would have taken. As noted above, the plaintiff is not required to abort the fetus or place the child for adoption,[45] but recovery may be limited to the point at which one of these actions could have taken place.[46] If the line is drawn at the point at which the fetus could have been aborted, the maximum recovery would include medical costs incident to the abortion, pain and suffering, emotional distress, loss of consortium, loss of wages during the recovery period, and the cost of a second sterilization when failure of the first is the basis of the action. Using the point at which the child could be placed for adoption—in other words, immediately after birth—maximum damages would include the medical expenses associated with the pregnancy, loss of wages during the pregnancy and recovery period, pain and suffering, emotional distress associated both with the pregnancy and the adoption, loss of consortium, and the costs of a second sterilization. The difference between the two points is that the latter will involve added medical expenses for the recovery, a longer period of time for loss of wages and consortium, and differences in emotional distress.

B. *Application of the Doctrine to Wrongful Birth Cases: Reasonable Mitigation as a Factual Issue*

Some courts in wrongful birth cases have supported the avoidance of consequences doctrine although it was not applicable in the specific case,[47] and others have used avoidance of consequences language in hold-

44. *See* Zimmerman v. Ausland, 266 Or. 427, 434, 513 P.2d 1167, 1170 (1973) (en banc); Restatement (Second) of Torts § 918 comments d, e (1979); Annot., 62 A.L.R.3d 70, 82-85 (1975); Annot., 62 A.L.R.3d 9, 26-37 (1975).

45. See *supra* note 38 and accompanying text.

46. See *supra* note 39 and accompanying text.

47. *See, e.g.*, Robak v. United States, 658 F.2d 471, 478-79 (7th Cir. 1981); Schork v. Huber, 648 S.W.2d 861, 862 (Ky. 1983). Citing other wrongful birth cases in which the court found that the avoidance of consequences doctrine had been applied, *Robak* noted:

> The parents in each case knew the mother was pregnant within the first trimester of pregnancy. It was thus their decision to have the child after the effects of the defendants' negligence was discovered. Because they freely chose not to have an abortion, they should be responsible for the costs of a normal child.

658 F.2d at 479 n.23. The court in *Schork*, discussing its decision not to award child rearing costs, stated that "in a pure legal sense the parents have failed to mitigate the damages which they charge." 648 S.W.2d at 862. The dissent noted that it is "unreasonable to require parents to submit the child in the womb to abortion, or the child in the crib to adoption." *Id.* at 866 (Leibson, J., dissenting).

ing that the failure to abort or place the child for adoption demonstrates that the benefits of child rearing outweigh the costs.[48] The few courts actually applying the doctrine[49] have found as a matter of law that reasonable mitigation includes abortion when the pregnancy is discovered in the first trimester and the mother's health is such that an abortion is not too risky.[50] One reason for this approach is to take away from the jury a

48. The leading case in this category is Shaheen v. Knight, 11 Pa. D. & C.2d 41 (1957). The court noted that "[m]any people would be willing to support this child were they given the right of custody and adoption." *Id.* at 46. This case was cited by a number of other courts denying child rearing costs. *See, e.g.*, Public Health Trust v. Brown, 388 So. 2d 1084, 1086 (Fla. Dist. Ct. App. 1980); Mason v. Western Pa. Hosp., 499 Pa. 484, 487, 453 A.2d 974, 976 (1982); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 519-20, 219 N.W.2d 242, 245 (1974).

In Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964), the same concept was expressed:

> As reasonable persons, the jury may well have concluded that appellants suffered no damage in the birth of a normal, healthy child, whom they dearly love, would not consider placing for adoption, and "would not sell for $50,000," and that the cost incidental to such birth was far outweighed by the blessing of a cherished child, albeit an unwanted child at the time of conception and birth.

Id. at 250, 391 P.2d at 204.

49. *See, e.g.*, Comras v. Lewin, 183 N.J. Super. 42, 45-46, 443 A.2d 229, 230 (1982); Sorkin v. Lee, 78 A.D.2d 180, 181, 434 N.Y.S.2d 300, 301 (1980); Ziemba v. Sternberg, 45 A.D.2d 230, 232-33, 357 N.Y.S.2d 265, 268-69 (1974).

50. In Ziemba v. Sternberg, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974), the court considered a case in which the pregnancy test administered during the first trimester failed to diagnose the pregnancy. *See id.* at 230-31, 357 N.Y.S.2d at 267. The mother would have had an abortion had she known she was pregnant. *Id.* at 231, 357 N.Y.S.2d at 267. In the fifth month of the pregnancy, the test was positive. The pregnancy was carried to term and a normal, healthy child was born. *Id.* at 234, 357 N.Y.S.2d at 270 (Cardamone, J., dissenting). The court stated that it would allow an award of all provable damages. *See id.* at 233, 357 N.Y.S.2d at 269. Child rearing costs would be included. *Id.* at 234, 357 N.Y.S.2d at 270 (Cardamone, J., dissenting). The dissent would have rejected the claim for damages because the mother failed to avail herself of her legal alternatives—having an abortion or placing the child for adoption. *Id.* In response to the dissent, the majority proposed that a two-factor test be used to determine if the parents should have been required to abort in order to mitigate damages. The first factor is the stage at which the pregancy was diagnosed. If it was discovered at an early stage of the pregnancy, when the risk of abortion to the mother's health is not too great, the mother might be expected to abort. *Id.* at 233, 357 N.Y.S.2d at 269. The second factor, the health of the particular mother, is used in considering the risks of the abortion. *Id.* Because in this case the pregnancy was discovered after the first trimester, and the mother was advised by the physician that an abortion would have been too risky, she was not required to abort in order to mitigate. *Id.*

In a subsequent case, Sorkin v. Lee, 78 A.D.2d 180, 434 N.Y.S.2d 300 (1980), the court considered a negligently performed vasectomy resulting in the birth of a normal, healthy child. *See id.* at 181, 434 N.Y.S.2d at 300. The court refused to award child rearing costs because they were too speculative, *see id.*, 434 N.Y.S.2d at 300, and out of proportion to the wrongdoing. *See id.* at 184, 434 N.Y.S.2d at 303. The court also applied the avoidance of consequences doctrine and held that because the pregnancy was discovered early, *see id.* at 183, 434 N.Y.S.2d at 302, and there was no showing that the medical condition of the mother contraindicated an abortion, *see id.* at 181, 434 N.Y.S.2d at 301, the plaintiffs' award should not be increased because of the failure to mitigate. *See id.* at 182, 434 N.Y.S.2d at 302. The dissent criticized the majority for deciding to apply the avoidance of consequences doctrine without letting the jury decide whether the reasons for not having an abortion were reasonable. *See id.* at 186, 434 N.Y.S.2d at 305-306 (Hancock, Jr.,

decision that might be influenced by the ethical and religious biases of the jurors.[51] In so doing, these courts run the risk of violating the plaintiff's deeply held religious, ethical and moral beliefs that make unreasonable a decision to abort or place a child for adoption.[52] Most courts, however, have rejected the avoidance of consequences doctrine, holding as a matter of law that no plaintiff should be required to abort the fetus or place the child for adoption in order to mitigate damages.[53] This, however, subjects the defendant to damages that may be based wholly on the whim of the plaintiff,[54] rather than on actual beliefs.

The question of abortion is indeed controversial and so emotionally charged[55] that a decision to abort would be unreasonable for a woman opposed to it. A large percentage of the general population would support a constitutional amendment to make abortions illegal.[56] The posi-

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J., dissenting). The majority's response was that while mitigation usually is an issue of fact for the jury, in this type of case the jurors would be influenced by their ethical and religious biases. *See id.* at 181-82, 434 N.Y.S.2d at 301. The decision on mitigation was therefore left as a matter of law for the court. *Id.* While the mother in *Ziemba* was in her second trimester of pregnancy, and the mother in *Sorkin* was in her first, an actual first trimester cutoff for when abortion would be required was not specified in either case. Other courts, however, have interpreted these decisions to imply the first trimester cutoff. *See* Robak v. United States, 658 F.2d 471, 479 n.23 (7th Cir. 1981); Comras v. Lewin, 183 N.J. Super. 42, 45-46, 443 A.2d 229, 230 (1982).

51. *See* Sorkin v. Lee, 78 A.D.2d 180, 181-82, 434 N.Y.S.2d 300, 301 (1980).

52. *See id.* at 187, 434 N.Y.S.2d at 304 (Hancock, Jr., J., dissenting).

53. *See, e.g.*, University of Ariz. Health Sciences Center v. Superior Court, 136 Ariz. 579, 586 n.5, 667 P.2d 1294, 1301 n.5 (1983) (en banc); Morris v. Frudenfeld, 135 Cal. App. 3d 23, 31, 185 Cal. Rptr. 76, 80 (1982); Stills v. Gratton, 55 Cal. App. 3d 698, 709, 127 Cal. Rptr. 652, 658 (1976); Custodio v. Bauer, 251 Cal. App. 2d 303, 324, 59 Cal. Rptr. 463, 477 (1967); Jones v. Malinowski, 299 Md. 257, 274, 473 A.2d 429, 438 (1984); Clapham v. Yanga, 102 Mich. App. 47, 58-59, 300 N.W.2d 727, 733 (1980), *appeal dismissed*, 412 Mich. 889, 335 N.W.2d 1 (1981); Troppi v. Scarf, 31 Mich. App. 240, 260, 187 N.W.2d 511, 520 (1971); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977); Kingsbury v. Smith, 122 N.H. 237, 243, 442 A.2d 1003, 1006 (1982); Rivera v. State, 94 Misc. 2d 157, 163, 404 N.Y.S.2d 950, 954 (Ct. Cl. 1978).

The decision as to whether an issue is a matter of fact or a matter of law is often based on policy considerations. *See* F. James & G. Hazard, Civil Procedure 267 (1977). Generally, the jury's role in a civil case is to decide the issues of fact presented in a case and to apply general legal rules to the fact situation. *Id.* at 230. As such, the jury will determine what the parties did and what the circumstances were, and evaluate the facts in terms of their legal consequences. *Id.* at 263. The court, however, can formulate rules of law that effectively exclude the jury from making these evaluations. *Id.* at 266. Generally, the determination of whether a defendant in a negligence case acted reasonably, according to the community standards for what a reasonably prudent person would do, is a matter of fact for the jury. *Id.* at 267. The judge can decide, however, whether specific conduct should or should not have been engaged in as a matter of law, and thus preclude the jury from evaluating the conduct. *Id.* at 266-67 (whether it is reasonable to require the driver of a car to blow his horn could be a matter of fact for the jury, or a matter of law to be decided by the court).

54. *See* Sorkin v. Lee, 78 A.D.2d 180, 184, 434 N.Y.S.2d 300, 303 (1980).

55. Roe v. Wade, 410 U.S. 113, 116 (1973); *see* Gest, *Abortion in America*, U.S. News & World Rep., Jan. 24, 1983, at 47, col. 1; Beck, *America's Abortion Dilemma*, Newsweek, Jan. 14, 1985, at 20, col. 1.

56. N.Y. Times, Oct. 14, 1984, at E3, col. 1. During the 1984 presidential campaign, the conflict on the abortion issue became a prominent issue. *Id.* In a poll conducted by

tion of the Catholic church is that abortion is equivalent to murder.[57] Thus, it is difficult to conclude that the reasonably prudent person would always choose to abort an unplanned pregnancy. Many women today are having abortions,[58] however, and may have no religious, moral or ethical opposition to the procedure. Whether a particular plaintiff has such beliefs, and whether these beliefs are sincere, should be a matter for the jury to decide. It cannot be assumed as a matter of law that all plaintiffs oppose abortion.

Placing the child for adoption presents a different issue. Religious and political organizations that oppose abortion support adoption as an alternative for the pregnant woman who does not want to raise her child.[59] There are no religious or moral prohibitions against adoption. Congress has expressed its support of adoption in the Adoption Assistance and Child Welfare Act of 1980.[60] There are many people seeking to adopt children;[61] over 8000 of them adopt children from foreign countries each year.[62] There may be over 100,000 adoptions occurring each year across the country.[63] Yet placing a child for adoption is an extremely difficult decision for parents when the mother has carried a pregnancy, even an

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the New York Times and CBS News during the week of September 30 to October 4, 1984, 43% of the respondents indicated that they would favor a constitutional amendment that would allow abortions only to save the life of a mother. *Id.* Another public opinion poll conducted by the National Opinion Research Center showed no major changes in public attitudes since 1972, in spite of the Supreme Court's landmark decision that year recognizing the right to abortion. *Id.*

57. *See* O'Connor, *Human Lives, Human Rights*, Catholic New York, Oct. 18, 1984, at S2-S3.

58. *See* Bureau of the Census, U.S. Dept. of Commerce, Statistical Abstracts of the United States, 1982-1983, at 68 (table no. 101). In 1979, nearly 1.5 million legal abortions were performed in the United States. *Id.* There were nearly 3.5 million live births that same year. *Id.* at 61 (table no. 86). Thus, there were 422 abortions for every 1000 live births, *id.* at 70 (table no. 104), or 297 abortions for every 1000 live births and abortions combined, *id.* at 68 (table no. 101).

59. *See* National Right to Life News, Jan. 12, 1984, at 4, col. 1 (special supplement on alternatives to abortion); National Right to Life News, Oct. 28, 1982, at 5-8 (special adoption insert); O'Connor, *supra* note 57, at S4-S5, col. 1 (discussing adoption services offered through the church).

60. Pub. L. No. 96-272, 94 Stat. 501 (codified as amended at 42 U.S.C. §§ 670-676 (1982)). This law provides for funding to states to provide financial assistance to persons who adopt children placed out of their own homes and living in foster care. *See* 42 U.S.C. § 673 (1982).

61. *See* National Committee for Adoption, Inc., Adoption Facts Summary—1984, at 5. It is estimated that there are 2,000,000 families seeking to adopt, based upon estimates of the number of people being treated for infertility and accounting for the overlap when both husband and wife are receiving treatment. *Id.*

62. *Id.* at 4. Of the 8054 children adopted from outside the United States in 1984, the majority were from Korea. *Id.*

63. *See* P. Maza, Adoption Trends: 1944-1975; Child Welfare Research Note #9 (United States Dep't of Health and Human Services, Administration for Children, Youth and Families, August 1984). In 1971, the last year that 50 states reported data to the National Center for Social Statistics, 159,844 adoptions were reported. *Id.* at 3. The author estimated that in 1975 there were 129,000 adoptions. *Id.* at 4.

unplanned one, to term.[64] Because the decision is a difficult one, however, does not mean that it is so unreasonable that, as a matter of law, plaintiffs should not be required to consider it as a mitigating action in wrongful birth cases. Nor should adoption be considered to be always reasonable just because it is reasonable for many people. If the jury is allowed to hear evidence regarding the beliefs of the particular plaintiff, it can consider the sufficiency and depth of those beliefs and determine whether they are such that mitigating by placing the child for adoption is not reasonable.[65]

One court noted that "to hold the [defendant] responsible for the cost of future care of a healthy normal child based upon the parent's private decision on how to accept the unplanned pregnancy is to inflict a penalty on the defendant that is out of all proportion to his wrong."[66] Yet it is equally unjust to deny those parents compensation for a wrong the mitigation of which would be unreasonable for them. By permitting inquiry into the decision during the trial, rather than declaring abortion and adoption placement reasonable or unreasonable as a matter of law, the court allows the jury to determine the sincerity of the parents' beliefs and to decide whether a decision to place the child for adoption would be reasonable under the plaintiffs' circumstances.[67]

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64. *See* Wilbur v. Kerr, 275 Ark. 239, 245, 628 S.W.2d 568, 572 (1982) (Dudley, J., dissenting); Stills v. Gratton, 55 Cal. App. 3d 699, 709, 127 Cal. Rptr. 652, 658 (1976) (quoting Troppi v. Scarf, 31 Mich. App. 240, 260, 187 N.W.2d 511, 519 (1971)); Berek, *Helping a Patient Surrender Her Child for Adoption*, 22 Contemp. OB/GYN 29 (1983); Campbell, *The Birthparent's Right to Know*, 37 Pub. Welfare 22, 24 (1979); Deykin, Campbell & Patti, *The Post Adoption Experience of Surrendering Parents*, 54 Am. J. Orthopsychiatry 271, 272 (1984). The trauma of this decision extends well into the years after the adoption, as the natural parents continue to experience mourning, a feeling of loss, depression, and future searching for the surrendered child. Deykin, Campbell & Patti, *supra*, at 271-73.

65. See *infra* notes 76-78 and accompanying text.

66. Sorkin v. Lee, 78 A.D.2d 180, 184, 434 N.Y.S.2d 300, 303 (1980).

67. This method also avoids arbitrary criteria for determining when the mother's health might override the need to mitigate. Those courts that require abortion as a mitigating action as a matter of law have developed criteria for determining when the health risks to the mother override the duty to mitigate. See *supra* note 50 and accompanying text. One criterion was that in order for abortion to be considered to be a reasonable mitigating action, the pregnancy had to be discovered at an early stage, when the risks from the abortion are minimal. *See* Ziemba v. Sternberg, 45 A.D.2d 230, 233, 357 N.Y.S.2d 265, 269 (1974). This presents the problem that while the woman who avoids the pregnancy test until a later stage, when the health risks are greater, will recover child rearing costs, the woman who makes an effort to detect the pregnancy at an early stage will not be able to do so. Further, the chance of fraudulent claims exists, in that a woman whose pregnancy was diagnosed in the first trimester could go to a different physician for a test in the second trimester and claim that the pregnancy was not discovered until then.

A second criterion is that the woman need not abort if her health contraindicates that procedure. Sorkin v. Lee, 78 A.D.2d 180, 181, 434 N.Y.S.2d 300, 301 (1980); Ziemba, 45 A.D.2d at 233, 357 N.Y.S.2d at 269. This, however, allows the unhealthy woman to recover child rearing costs while the healthy woman will not be able to do so.

These problems become irrelevant when considering the alternative of placing the child for adoption as the point of mitigation. The ability to make this decision is not based on the health of the parent. Nor is it based on the stage at which the pregnancy is detected,

C. *The Jury's Determination of Reasonableness*

A better approach, and the one intended in the Restatement (Second) of Torts, is to leave the issue of mitigation to the jury.[68] The test is whether a reasonable person in the plaintiff's circumstances would have either had an abortion upon discovery of the pregnancy or placed the child for adoption upon its birth.[69] The jury would consider several circumstances: the religious, moral and ethical beliefs of the parents,[70] the point at which the pregnancy was discovered,[71] the health of the mother,[72] the parents' prior history of abortion or adoption placement,[73] the reasons the parents sought to prevent the pregnancy in the first place,[74] and the parents' reason for not wanting to place the child for adoption.[75]

Juries in personal injury cases have considered the health risks to the

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a consideration that can lead to fraud. While there may be some strong moral or emotional beliefs of the parents which contraindicate placing the child for adoption, these can be proven by the parents and considered by the jury in determining whether adoption placement is an appropriate mitigating action under the plaintiff's circumstances.

68. *See* Restatement (Second) of Torts § 283 comment c (1979). The standard of the reasonably prudent person is one that

> enables the triers of fact who are to decide whether the actor's conduct is such as to subject him to liability for negligence, to look to a community standard rather than an individual one, and at the same time to express their judgment of what that standard is in terms of the conduct of a human being.

Id.

69. *Cf.* Restatement (Second) of Torts § 283 (1979) (discussing the reasonably prudent person standard). Professor Dobbs, however, believes that an objective standard based upon the hypothetical reasonable man is too narrow a test when considering the avoidance of consequences doctrine. The standard should be not so much the objective standard of a reasonable man, but the subjective standard of what can reasonably be expected of the particular plaintiff. D. Dobbs, *supra* note 41, at 580.

70. See *infra* notes 76-78 and accompanying text.

71. Sorkin v. Lee, 78 A.D.2d 180, 183, 434 N.Y.S.2d 300, 302 (1980); Ziemba v. Sternberg, 45 A.D.2d 230, 233, 357 N.Y.S.2d 265, 269 (1974).

72. Ziemba v. Sternberg, 45 A.D.2d 230, 233, 357 N.Y.S.2d 265, 269 (1974). See *infra* note 76 and accompanying text.

73. This evidence would address both the sincerity and the veracity of the plaintiff's assertion about her beliefs. Other courts, however, have not given this much weight when considering the issue of mitigation. *Compare* Delaney v. Krafte, 98 A.D.2d 128, 129, 470 N.Y.S.2d 936, 937 (1984) *with* Stills v. Gratton, 55 Cal. App. 3d 698, 709, 127 Cal. Rptr. 652, 658 (1976). In *Delaney*, the New York court applied the test from *Ziemba* and *Sorkin*, see *supra* note 50, and held that a woman whose first trimester abortion had failed was not required to mitigate by having another abortion when she did not discover she was still pregnant until the second trimester. *See* 98 A.D.2d at 129, 470 N.Y.S.2d at 937. The prior abortion was not a factor in the court's decision on her duty to mitigate; the overriding concern being the health risk of the abortion. *See id.* In *Stills*, the same fact pattern was present, but the court based its decision not to require mitigation on its assertion that mitigation by abortion was unreasonable as a matter of law. *See Stills*, 55 Cal App. 3d at 709, 127 Cal. Rptr. at 658.

74. *See* Hartke v. McKelway, 707 F.2d 1544, 1553-55 (D.C. Cir.), *cert. denied*, 104 S. Ct. 425 (1983); Jones v. Malinowski, 299 Md. 257, 270-71, 473 A.2d 429, 436 (1984); Troppi v. Scarf, 31 Mich. App. 240, 256, 187 N.W.2d 511, 518 (1971); Christensen v. Thornby, 192 Minn. 123, 125, 255 N.W. 620, 621 (1934).

75. See *supra* note 64 and accompanying text.

plaintiff that might arise from the mitigating action,[76] but consideration of religious, ethical, moral and personal issues is less common[77] and more difficult. Some plaintiffs in personal injury cases have asserted their Christian Science religious beliefs to explain their failure to undergo medical treatment, and have attempted to place the costs of the increased injury on the defendant.[78] Some courts allow the jury to consider the plaintiff's religious beliefs as one of the circumstances involved in determining the plaintiff's reasonableness in treating the injury.[79] These courts have recognized that plaintiffs should not be penalized for acting within their religious beliefs, and would seem to support examination of the religious, ethical and moral beliefs of wrongful birth plaintiffs to determine whether they failed to take reasonable mitigating actions.

The approach herein proposed is not without problems. First, testimony on personal beliefs is difficult to support and easily perjured.[80] Thus, the jurors must make a very difficult decision in determining the honesty, sincerity and strength of those beliefs.[81] Second, it is difficult

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76. *See, e.g.*, Stark v. Shell Oil Co., 450 F.2d 994, 997-98 (5th Cir. 1971); McGinley v. United States, 329 F. Supp. 62, 66 (E.D. Pa. 1971); Jones v. Eppler, 266 P.2d 451, 455-56 (Okla. 1953); Zimmerman v. Ausland, 266 Or. 427, 433-34, 513 P.2d 1167, 1170 (1973).

77. *See* Annot., 62 A.L.R.3d 9, 17 (1975).

78. *See* Christiansen v. Hollings, 44 Cal. App. 2d 332, 344, 112 P.2d 723, 729 (1941); Lange v. Hoyt, 114 Conn. 590, 593-95, 159 A. 575, 576-77 (1932); Miller v. Hartman, 140 Kan. 298, 299, 36 P.2d 965, 965 (1934).

79. In Lange v. Hoyt, 114 Conn. 590, 159 A. 575 (1932), the court noted that

> [w]hile the test of conduct on the part of a plaintiff in promoting a recovery from injuries suffered is one of reasonable care and cannot be made to depend upon the idiosyncracies of personal belief no matter how honestly held, courts cannot disregard theories as to proper curative methods held by a large number of reasonable and intelligent people. . . . [I]n determining whether the plaintiff . . . exercised a reasonable degree of care, the jury were entitled to consider with all the other evidence, her conduct in the light of her belief in the doctrines of the Christian Science Church and the extent to which she acted in accordance with them.

Id. at 596-97, 159 A. at 577-78. In Christiansen v. Hollings, 44 Cal. App. 2d 332, 112 P.2d 723 (1941), the court also allowed consideration of the religious beliefs.

> [W]here the injuries are not of such a nature [where the reasonably prudent person would necessarily seek medical care], as in the present case, the jury may properly consider the religious beliefs of the injured person in ascertaining whether he exercised reasonable care. Certainly, the courts should not disregard the beliefs held by a large number of reasonable and intelligent people in passing on the efficacy of the curative means adopted by the injured person.

Id. at 346, 112 P.2d at 730. The court in Miller v. Hartman, 140 Kan. 298, 36 P.2d 965 (1934), without a rationale for its decision, refused to consider the Christian Science beliefs of the plaintiff, and held that "[o]ne cannot enhance his damages by failing to take reasonably appropriate action, readily available, to mitigate the damages." *Id.* at 300, 36 P.2d at 966.

80. *Cf.* Prosser and Keeton, *supra* note 2, § 54, at 361 (discussing emotional distress damages). Testimony on personal beliefs is similar to testimony on emotional distress damages, in that both require the person to declare what is in his own mind. Prosser and Keeton note that one of the reasons courts have limited and denied damages for emotional distress is the danger that the testimony will be falsified or impaired. *See id.*

81. *See* Sorkin v. Lee, 78 A.D.2d 180, 181-82, 434 N.Y.S.2d 300, 301 (1980).

for the defendant to rebut testimony about personal beliefs.[82]

D. *Shifting the Burden of Proof on Plaintiff's Beliefs*

One way to avoid these problems would be to shift the burden of proof from the defendant to the plaintiff.[83] Currently, the defendant must prove by a preponderance of the evidence that the plaintiff failed to mitigate.[84] Thus all the plaintiff need do is present sufficient rebuttal evidence to outweigh whatever evidence the defendant can introduce.[85] Placing the burden of persuasion on the plaintiff regarding issues of personal belief would require the plaintiff to persuade the jury that these beliefs are sincere and that mitigation should not be required. The jury will have to examine the evidence and objectively determine if the plaintiff has actually proved that her beliefs about abortion or adoption are such that the actions were not reasonable. Further, if a decision for the plaintiff is clearly not based on the evidence, the court can reverse the jury and impose judgment notwithstanding the verdict.[86] Additionally, with the shifted burden of proof, the defendant's burden of rebuttal is more manageable.[87]

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82. *Cf.* Prosser and Keeton, *supra* note 2, § 54, at 361 (discussing emotional distress damages). The authors note that the primary reason for requiring that physical symptoms be present to recover for emotional distress damages is that it provides adequate objective proof of the injury. *See id.* While a defendant can rebut objective proof, trying to rebut a state of mind is much more difficult.

83. *See* McCormick on Evidence, *supra* note 42, § 336, at 947. The burden of proof consists of two separate elements: the burden of production and the burden of persuasion. Once the party who has pleaded the existence of a fact produces evidence from which the court could infer the fact, *id.* § 338, at 952-53, the party must persuade the trier of fact (judge or jury) that the alleged fact is true. *Id.* § 336, at 947. At the time for the verdict, the jury is instructed as to which party has the burden of persuasion and what standard of proof must be met. While the person pleading the fact usually has the burden of persuasion, the burden can be shifted to the other party. *Id.* § 337, at 949. Guidelines for how the burden is allocated have not been consistent, *see id.*, but some of the more logical reasons include allocating the burden to a party where the fact lies particularly within the knowledge of that party, *id.* § 337, at 950, or allocating it to the party who contends that the more uncommon or least likely event has occurred, *id.* § 337, at 950 & n.12. Because that party in the wrongful birth suit would be the plaintiff, the burden should be allocated to her.

84. See *supra* note 42 and accompanying text. Preponderance of evidence requires a showing that the happening of an event is more probable than not. McCormick on Evidence, *supra* note 42, § 339, at 957. Thus, the defendant must present sufficient evidence to convince the jury that a reasonable person in the position of the plaintiff would more probably than not have undertaken the mitigating action.

85. See G. Lilly, *supra* note 40, § 15, at 45. See *supra* note 42 and accompanying text.

86. After the jury has returned a verdict against the defendant, a motion for a judgment not withstanding a verdict (judgment non obstante veredicto (n.o.v.)) can be made. A. Jones, J. Kernochan & A. Murphy, Legal Method 61-62 (1980). The court, in granting this motion, disregards the jury's verdict because the evidence is so insufficent that reasonable men could not conclude that the defendant is liable. *Id.* at 62 & n.24. If the court finds that the plaintiff's evidence as to his or her belief about abortion and adoption is so insufficient that a reasonable (and unbiased) jury could reach no other conclusion than that such beliefs were not actual or sincere, the jury's verdict could be disregarded.

87. Because the plaintiff must now prove mitigation is not reasonable, the defendant

Using this method of applying the avoidance of consequences doctrine avoids forcing unreasonable actions on plaintiffs without overburdening defendants with inflated damage claims. By allowing the plaintiff to present his or her beliefs regarding abortion or adoption, without assuming that these actions are either reasonable or unreasonable as a matter of law, the plaintiff who truly opposes these actions will not be subjected to a standard that treats plaintiffs of varying moral beliefs equally. By allowing the defendant to challenge these beliefs in court, defendants will not be subjected to excessive damage claims from plaintiffs seeking compensation for personal decisions not supported by sincere opposition to abortion or adoption as mitigation.

E. *Further Criticisms of the Use of the Avoidance of Consequences Doctrine*

Several courts criticize the use of the avoidance of consequences doctrine in wrongful birth suits on grounds other than the religious, ethical and moral beliefs involved. One frequent criticism is that a court should not force parents to make the untenable choice between rearing the child and either aborting the fetus or placing the child for adoption.[88] This argument presumes a duty to take the mitigating action, a duty that does not actually exist.[89] There is no obligation either to terminate the pregnancy through abortion or to place the child for adoption, but the recovery of the plaintiffs is limited to those damages incurred up to the point when action could have been taken.[90] Thus, the parents do have a choice when the avoidance of consequences doctrine is applied: They can terminate the pregnancy, place the child for adoption, or rear the child themselves—possibly at their own expense.

Another criticism has been that the decision to abort the fetus or place the child for adoption places such great stress on the parents that it is unreasonable to force them to make this decision.[91] Many courts, how-

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need only provide sufficient rebuttal to equal approximately the amount of the plaintiff's evidence. If the jury believes that the probability of the plaintiff's assertion is equally likely to be true or false, the plaintiff will lose. G. Lilly, *supra* note 42, § 15, at 47.

88. *See* University of Ariz. Health Sciences Center v. Superior Court, 136 Ariz. 579, 586 n.5, 667 P.2d 1294, 1301 n.5 (1983) (en banc); Wilbur v. Kerr, 275 Ark. 239, 245, 628 S.W.2d 568, 572 (1982) (Dudley, J., dissenting); Morris v. Frudenfeld, 135 Cal. App. 3d 23, 31, 185 Cal. Rptr. 76, 80 (1982); Cockrum v. Baumgartner, 95 Ill. 2d 193, 207, 447 N.E.2d 385, 392 (Clark, J., dissenting), *cert. denied.*, 104 S. Ct. 149 (1983); Schork v. Huber, 648 S.W.2d 861, 866 (Ky. 1983) (Leibson, J., dissenting); Clapham v. Yanga, 102 Mich. App. 47, 58-59, 300 N.W.2d 727, 733 (1980), *appeal dismissed*, 412 Mich. 889, 335 N.W.2d 186 (1982); Kingsbury v. Smith, 122 N.H. 237, 243, 442 A.2d 1003, 1006 (1982).

89. See *supra* note 38 and accompanying text.

90. See *supra* note 39 and accompanying text.

91. *See* Troppi v. Scarf, 31 Mich. App. 240, 259-60, 187 N.W.2d 511, 520 (1971).

> [T]he psychological impact on [the parents] of rejecting the child and placing him for adoption, never seeing him again, would be such that, making the best of a bad situation, it is better to rear the child than to place him for adoption.

Id. at 259, 187 N.W.2d at 520.

ever, award damages for emotional distress and mental anguish as part of the wrongful birth award.[92] Section 919 of the Restatement (Second) of Torts specifies that the plaintiff is awarded costs of any reasonable mitigating action.[93] Thus, the emotional distress associated with the abortion or adoption decision can be considered as part of the damages.[94]

A third argument is that requiring such a decision interferes with constitutionally guaranteed personal privacy rights to be free from government interference in decisions relating to family planning and abortion.[95] However, just as the right to an abortion does not translate into an obligation to have one to mitigate damages,[96] but rather recognizes the mother's right to make her decision, a plaintiff in a wrongful birth case is not forced to accept governmental interference in a decision. The plaintiff, by bringing the wrongful birth suit, brings her decision before the court and seeks compensation for it. The defendant certainly has the right to ask the jury to examine the reasonableness of this decision.[97] Further, even with the application of the avoidance of consequences doctrine, the plaintiff maintains complete freedom to choose how to handle the unwanted pregnancy.[98] The only limitation is that the parents will

92. See *supra* note 15 and accompanying text. While, traditionally, courts have been reluctant to award emotional distress damages to parents for the wrongful death of a minor child, D. Dobbs, *supra* note 41, § 8.4, at 559, recovery has been permitted based on the loss of the child's companionship. *Id.* § 8.4, at 560.

93. *See* Restatement (Second) of Torts § 919 (1979).

94. *See* Samuels v. Weiss, N.Y.L.J., March 8, 1985, at 12, col. 3 (N.Y. Sup. Ct. March 7, 1985) (awarding damages for the emotional distress of placing the child for adoption). This is certainly not to suggest that the award of monetary damages can erase the anguish experienced by a parent who has decided to abort or place the child for adoption. See *supra* note 64 and accompanying text. If the parents can be compensated for the anguish of the unwanted pregnancy, however, the extension of these awards can be made to the period after the mitigation decision.

95. Rivera v. State of New York, 94 Misc. 2d 157, 163, 404 N.Y.S.2d 950, 954 (Ct. Cl. 1978). The constitutional right to privacy was first recognized in Griswold v. Connecticut, 381 U.S. 479, 485 (1965), regarding the right to be free from government interference in family planning decisions. In Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court recognized the right to be free from such interference regarding the decision to abort during the first trimester of the pregnancy. *Id.* at 163.

96. Ziemba v. Sternberg, 45 A.D.2d 230, 233, 357 N.Y.S.2d 265, 269 (1974).

97. In Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977), the issue of the waiver of the right to privacy when bringing suit was examined. When a woman sued for emotional distress damages as a result of an auto accident, her psychiatrist refused to testify, citing doctor-patient privilege. *Id.* at 1065-66. The psychiatrist contended that a California statute waiving this privilege when a patient sued for mental distress damages was unconstitutional in light of Griswold v. Connecticut, 381 U.S. 479 (1965), and Roe v. Wade, 410 U.S. 113 (1973). *Caesar*, 524 F.2d at 1067. The court held that such regulation was not unconstitutional in light of these decisions. *Id.* at 1068.

> Although the effect of the [statute] may be to require litigants to make some hard choices before bringing a lawsuit and may in fact discourage some legal action, . . . [e]very person who brings a lawsuit under our system of jurisprudence must bear disclosure of those facts upon which his claim is based.

Id. (citations and footnotes omitted).

98. See *supra* note 38 and accompanying text.

not always be compensated for the decision to raise the child themselves.[99]

Finally, it has been argued that using adoption as the mitigating action is not in the child's best interests.[100] The "best interests" doctrine is often used in child custody cases to determine which parent is best suited to care for the child.[101] One commentary has noted that an important consideration in the child's best interests is that the child not be removed from a home where emotional ties have been formed.[102] Placing a child for adoption at birth, however, presents little danger of harming the newborn's emotional ties.[103] Moreover, adoption may actually be in the child's best interests. Placing the child with adoptive parents who truly want the child may be better than leaving him or her with parents who did not plan for or initially want the child, and who may later become resentful about the child's birth.[104] Children raised by adoptive parents often fare better than those raised by parents who did not initially want the child.[105] It is also questionable whether a child's best interests are being served when he knows that someone else is paying for his upbringing because his parents did not plan for him.[106] There is thus little sup-

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99. See *supra* note 39 and accompanying text.

100. *See* Custodio v. Bauer, 251 Cal. App. 2d 303, 324-25, 59 Cal. Rptr. 463, 477 (1967); Clapham v. Yanga, 102 Mich. App. 47, 59-60, 300 N.W.2d 727, 733-34 (1980), *appeal dismissed*, 412 Mich. 889, 335 N.W.2d 1 (1982); Troppi v. Scarf, 31 Mich. App. 240, 259, 187 N.W.2d 511, 520 (1971).

101. *See* McLendon v. McLendon, 455 So. 2d 863, 866 (Ala. 1984); Fitzgerald v. Fitzgerald, 464 A.2d 110, 112 (D.C. 1983); Creary v. Creary, 447 So. 2d 60, 60 (La. Ct. App. 1984); Villarreal v. Villarreal, 684 S.W.2d 214, 217 (Tex. Ct. App. 1984); Bills v. Bills, 296 S.E.2d 348, 349 (W. Va. 1982); H. Clark, Law of Domestic Relations in the United States § 17.5, at 592 (1968) ("no one, not even a parent, has a 'right' to custody, and the custody should always be determined in the way which best serves the interests of the child").

102. J. Goldstein, A. Freud, & A. Solnit, Beyond the Best Interests of the Child 53-54 (1973).

103. *See id.* at 17.

104. *See* Baran, Pannor & Sorosky, *Open Adoption*, 21 Soc. Work 97, 99 (1976).

105. Two studies focused on children of mothers who had requested an abortion during their pregnancies but were denied. In Forssman & Thuwe, *One Hundred and Twenty Children Born After Application for Therapeutic Abortion Refused*, 42 Acta Psychiatrica Scandinavica 71 (1966), the researchers found that the "unwanted" children had a less secure family life, received more psychiatric services, and were involved in criminal and antisocial behavior more often than children from the general population. *See id.* at 86-87. In Matejcek, Dytrych & Schuller, *Children from Unwanted Pregnancies*, 57 Acta Psychiatrica Scandinavica 90 (1978), the researchers found deficiencies in psychosocial development and educational achievement among children from unwanted pregnancies. *See id.* at 90; *see also* J. Goldstein, A. Freud & A. Solnit, *supra* note 102, at 20-21 (noting that unwanted infants have a reduced chance of healthy growth and development unless they are placed with loving parents).

106. See *supra* note 23 and accompanying text. In one case, the court's concern about the impact on the child resulted in the following closing note:

> Since the child involved might some day read this decision as to who is to pay for his support and upbringing, we add that we do not understand this complaint as implying any present rejection or future strain upon the parent-child relationship. Rather we see it as an endeavor on the part of clients and counsel

port for the proposition that as a matter of law, placing the child for adoption is not in the child's best interests and is therefore an unreasonable action for the parents.

CONCLUSION

The use of the avoidance of consequences doctrine in wrongful birth cases has been fraught with controversy. Nevertheless, it provides a valid mechanism for limiting damage recoveries in these cases so that the plaintiff cannot place on the defendant a burden out of proportion to the wrongdoing. The doctrine has been misapplied by some of the courts that have used it, and the mitigating actions have been erroneously considered by other courts to be unreasonable as a matter of law. By applying the doctrine as intended in the Restatement (Second) of Torts and allowing the jury to examine the circumstances of the plaintiff in determining whether or not mitigation was appropriate, the award of damages will be fair to both plaintiffs and defendants. Damages will include all costs up to the point at which mitigation should have occurred and, where mitigation is unreasonable because of the beliefs of the plaintiffs, child rearing costs. By shifting the burden of persuasion to the plaintiff, the evidence of personal belief that is introduced will be less likely to be perjured. A reasoned application of the doctrine of avoidance of consequences will allow courts to avoid overburdening defendants without forcing on plaintiffs untenable decisions regarding abortion or adoption.

Norman M. Block

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to determine the outer limits of physician liability for failure to diagnose the fact of pregnancy.

Rieck v. Medical Protective Co., 64 Wis. 2d 514, 520, 219 N.W.2d 242, 245-246 (1974).